one hand, they indirectly improve the highway as a means of travel since it is thereby drained, lighted, etc. On the other, they afford the abutting owner an incidental benefit of material value. Both elements, it is conceived, are essential to make the use a proper one. Thus the stringing of telephone wires, though of incidental benefit to the abutter, would be improper, for it in no way affects the public interest. 4 Harv. L. Rev. 240. Conversely, a use beneficial to the public would impose a new burden if the abutter received no incidental benefit. Thus a sewer built, not for the benefit of the abutting owners of the highway through which it passes, but for those of a nearby town, is not a proper use of the highway. *Van Brunt* v. *Flatbush* (1891) 128 N. Y. 50. It is only upon the latter rule that the distinction between the servitudes to which urban and rural highways may be subjected, can be supported. To say that the uses of a highway vary according as the highway is situated in the city or in the open country is hardly supportable. Most urban streets were originally rural roads. The mere change of surroundings cannot be deemed to have increased the purposes for which the abutting owner dedicated the highway. Lewis, Em. Dom. 91, c. Clearly, it may be added, uses neither required by considerations of a public nature nor affording benefit to the abutter are an additional burden on the fee. *Eels* v. *A. T. & T. Co., supra.*

WAIVER OF THE RIGHT TO TRIAL BY TWELVE JURORS IN CRIMINAL ACTIONS. —The United States Circuit Court of Appeals, First Circuit, has recently held (Aldrich, J., dissenting) that the guaranty in the Federal Constitution of trial of crimes by jury is something which the accused has no power to waive; and that the jury contemplated is a body of twelve. *Dickinson* v. *U. S.* (1908) 159 Fed. 801. Accordingly, contrary to a ruling of Chief Justice Shaw on similar facts, *Com.* v. *Dailey* (1853) 12 Cush. 80, a verdict of conviction rendered by ten jurors was set aside, notwithstanding the defendant's agreement upon the discharge of the two jurors that the trial, already well under way, should continue with unimpaired force, and although the offense, while an "infamous crime," see *Ex parte Wilson* (1885) 114 U. S. 417, was a misdemeanor only.

Whether a person accused of a crime within the constitutional guaranty, see *Callan* v. *Wilson* (1887) 127 U. S. 540; *Schick* v. *U. S.* (1904) 195 U. S. 65, can legally consent to trial by a judge alone or with less than twelve jurors is almost a new Federal question; but it has arisen often under State Constitutions, and with inharmonious results. This disagreement is due to the existence of three distinct conceptions of the guaranty itself. *Per* Mitchell, J., in *State* v. *Woodling* (1893) 53 Minn. 142. According to the first view, it is a privilege intended merely for the benefit of the accused, *State* v. *Sackett* (1888) 39 Minn. 69, like other Constitutional guaranties which concededly may be waived, e. g., the right to a jury in civil suits, *U. S.* v. *Rathbone* (1835) 2 Paine 578, trial in the county where the crime was committed, *Dula* v. *State* (Tenn. 1835) 8 Yerg. 511, and the right to be confronted by the State's witnesses. *State* v. *Polson* (1870) 29 Ia. 133. Where the provision for the trial of crimes by jury occurs in the "bill of rights", cf. *Edwards* v. *State* (1883) 45 N. J. L. 419, or its

language is expressive of a privilege (e. g. "the accused shall enjoy the right, etc.," or even perhaps, "the right shall remain inviolate" or "shall be preserved"), this first conception may be correct, see *State* v. *Worden* (1878) 46 Conn. 349; but not, it would seem, where the provision is in that part of the Constitution which deals with the frame-work of government (e. g. Art. III, §2, clause 3 of the Federal Constitution), or its terms are mandatory. See *State* v. *Holt* (1884) 90 N. C. 749. The second view regards the guaranty of trial of crimes by jury as one in which the State also has an interest, for the due protection of the accused. *Cancemi* v. *People* (1858) 18 N. Y. 128; *Hill* v. *People* (1868) 16 Mich. 351. That the State by accepting a plea of guilty constantly does permit the omission of this safeguard is not, as often urged, a valid criticism; for the ancient practice of allowing pleas of guilt must have been in the minds of the Constitution framers. A more serious objection is presented by the fact that the accused is permitted to reject other constitutional safeguards, seemingly as vital. Thus he is vouchsafed an impartial trial, yet bias in a juror may be waived. It may be answered however that the jury system, as the supreme safeguard, is in a separate category. This argument, it is submitted, seems accordant with the attitude of the common law, and it has especial force wherever the language of the provision for trial of crimes by jury, in contrast with that of provisions for safeguards, deemed dispensable, is unmistakably mandatory. The third theory is that the presence of twelve jurors is essential to the jurisdiction of the Court. *Harris* v. *People* (1889) 128 Ill. 585; *Bell* v. *State* (1870) 44 Ala. 393. Herein lies the vice of the dissenting opinion in the principal case. The Court is competent to proceed to judgment on a plea of guilty, cf. *State* v. *Almy* (1892) 67 N. H. 274, because such a plea leaves nothing for the jury to perform. *West* v. *Gammon* (1899) 98 Fed. 426. But the plea "not guilty" at once raises issues of fact the determination of which is the exclusive function of the jury, and this jury, at least up to the adoption of the Federal Constitution, consisted of twelve. Cf. *Carpenter* v. *State* (Miss. 1839) 4 How. 163. It follows that in the absence of a statute conferring jurisdiction, the Court alone or with a panel of less than twelve jurors, is a tribunal unknown to the law. See Cooley, Const. Lim. (7th Ed.) 456-9. Statutes have been passed in some states, and held constitutional, remedying this jurisdictional defect. *In re Staff* (1885) 63 Wis. 285; *Brewster* v. *People* (1899) 183 Ill. 143. But where the second view of the nature of the guaranty of jury trial of crimes obtains, such a statute ought not to be sustained.

The minority in the principal case attempts a distinction, apparently recognized in Iowa, between a case where the trial started with a complete panel, later diminished, and one not so begun. Contrast *State* v. *Kaufman* (1879) 51 Ia. 578 and *State* v. *Carman* (1884) 63 Ia. 130. The accidental character of the former situation and the disadvantages, to State and the accused alike, of a mistrial, are persuasive considerations; but both cases involve the same jurisdictional infirmity. This answer should be applied also to the suggestion that in respect to waiver of trial by twelve jurors felonies are distinguishable from misdemeanors; and although waiver has been allowed more often in misdemeanor cases, the validity of such a distinction has been properly denied. *In re McQuown* (Okl. 1907) 91 Pac.

689, 692. True, the Supreme Court, in *Thompson* v. *Utah* (1898) 170 U. S. 343, held that a person accused of felony could not authorize a jury of eight, whereas in *Schick* v. *U. S., supra,* it decided, in terms, that a jury might be "waived" in petty misdemeanors. But the *Schick* case actually decided, it is submitted, only that the right to a jury trial for such offenses did not in fact exist.

The *Schick* case does, however, appear to lend some sanction to the position taken by Aldrich, J., in the principal case; for Brewer, J., speaking for the Court, cites *Com.* v. *Dailey, supra,* approvingly, and Harlan, J., stood alone in his contention that as no crime, however trivial, was summarily triable by a magistrate at common law except under Act of Parliament, the appellant, in the absence of a statute conferring the requisite jurisdiction, had not been convicted by a legally constituted tribunal. Moreover, whereas in *Hopt* v. *Utah* (1884) 110 U. S. 574 it was unanimously held that the accused had no power to waive a statutory right to be present during his entire trial, more recently, in *Queenan* v. *Oklahoma* (1902) 190 U. S. 548, a juror's disqualification, appearing in the course of the trial but waived by the accused, was declared, unanimously, not to vitiate the verdict. This apparent growing disposition against technical defenses might lead the Supreme Court to follow *Com.* v. *Dailey, supra.* But in the absence of authority that at common law, in misdeameanor cases triable by jury, a verdict could be rendered by less than twelve jurors, the principal case is logically sound. And it is even doubtful that a Federal statute authorizing consent to a reduction of the panel ought to stand if passed, in view of the position and the peremptory language of Art. III, §3, clause 2 of the Constitution: "The trial of all crimes shall be by jury." Cf. *Bank* v. *Okley* (1819) 4 Wheat. 235, 244.

Proof of Dangerous Tendency by Evidence of Prior Effect.—The dissenting opinion in a recent New York case illustrates a reactionary tendency which has already assumed considerable proportions. The majority held that evidence of a prior accident in a passageway through an elevator shaft was admissible, to indicate the dangerous character of the place. Two justices maintained that, since it was not shown that the defendant knew of the former accident, the testimony was incompetent. *Cefola* v. *Siegel-Cooper Co.* (1908) 111 N. Y. Supp. 1112.

Where such knowledge of dangerous tendency or quality is possessed by the individual charged with responsibility, evidence of the accidents whether one or many, through which this knowledge was derived, is uniformly admitted. Clearly, it gives rise to an inevitable inference of negligence. *City of Chicago* v. *Powers* (1866) 42 Ill. 169. But even where such notice and knowledge are lacking, proof of prior effect, it is submitted, is relevant. In order to investigate properly the merits of a given accident, it is not merely desirable, but material to determine the tendency, nature, and quality of the place or object involved. To determine these accurately, it is essential to apply the practical test of common experience. *Phelps* v. *R.R. Co.* (1887) 37 Minn. 487. Failure to realize the true evidentiary purpose and that negligence or due caution are, at best, merely indirect in-